In the

Supreme Court of the United States

October Term, 1936 No. [illegible]

HIRAM STEELMAN, Trustee in Bankruptcy
of WILLIAM FOX, a Bankrupt,

Petitioner,

vs.

ALL CONTINENT CORPORATION,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit, and Brief in Support Thereof

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1936. No.

HIRAM STEELMAN, TRUSTEE IN BANKRUPTCY OF WILLIAM FOX, A BANKRUPT,

Petitioner,

VS.

ALL CONTINENT CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

PETITION

Your petitioner, HIRAM STEELMAN, trustee in bankruptcy of William Fox, a bankrupt, respectfully shows:

This is a petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Third Circuit to review a decision reversing a decree of the United States District Court for the District of New Jersey, in bankruptcy, enjoining prosecution by respondent of a suit in the United States District Court for the Eastern District of Pennsylvania against petitioner, as trustee in bankruptcy of William Fox.

I

STATEMENT

William Fox was adjudicated a bankrupt on May 29, 1936, by the United States District Court for the District of New Jersey (hereinafter called "bankruptcy court"). Your petitioner was appointed trustee in bankruptcy, and duly qualified as such (R. 12, 13).

Respondent, All Continent Corporation (a Delaware corporation), appeared in said bankruptcy proceeding and filed proof of claim as an alleged creditor of William Fox (R. 20).

The only assets turned over to your petitioner, as trustee, consisted of $100 in cash and certain notes and securities of little or no value. Listed liabilities were in excess of $9,000,000 (R. 20).

Orders were entered directing examination of the respondent, and certain of its officers, directors, accountants and bookkeepers pursuant to Section 21 (a) of the Bankruptcy Act. Respondent's president (wife of the bankrupt) refused to submit to such examination and was cited for contempt by the referee (R. 13, 17, 18).

In the course of the examinations under Section 21 (a), the referee found that a thorough examination and audit of the respondent's books was "absolutely necessary to the proper administration of the estate

of the bankrupt" (R. 14-16). This conclusion was based upon the following facts, as summarized by the referee (R. 14-16), which had appeared concerning the relationship between respondent and the bankrupt:

> "The All Continent Corporation, whose books and records are here sought to be examined, was the creation of the bankrupt himself; every dollar of its capital came from the bankrupt; by the formation of the corporation, he divested himself of a very substantial portion of his property; all of its capital stock, now allegedly owned by the wife of the bankrupt, has never been transferred upon the books of the corporation, and the bankrupt still appears as the record holder thereof; from the time of the formation of the corporation, the bankrupt retained in his possession and under his control, the securities forming the assets of the corporation; in numerous instances, the bankrupt dealt with the assets of corporation as his own; the bankrupt from the time of the formation of the corporation, had power of attorney to act for it with extremely broad powers; the bankrupt was undoubtedly the guiding spirit in all of the affairs of the corporation throughout its entire corporate existence; the books and records already in evidence disclose that the corporation made disbursements for the account of the bankrupt and various corporations owned by him, and that the major portion of the transactions of the corporation were transactions of this type, or transactions in

> which the bankrupt or the corporations which he owned, were involved; * * * ; this chain of facts and circumstances and many others in the record of testimony already adduced, demonstrate clearly that the affairs of the All Continent Corporation were so related to and intertwined with the property and affairs of the bankrupt as to render absolutely necessary to the proper administration of the estate of the bankrupt a complete and thorough examination and audit by the trustee of the books and records of the All Continent Corporation." (R. 14-16)

Accordingly, the referee ordered respondent to make its books available for such examination. Proceedings by respondent to review said order are now pending (R. 16, 17).

At this point, respondent brought a suit in the United States District Court for the Eastern District of Pennsylvania (hereinafter called the "Pennsylvania suit") in which respondent joined your petitioner as an absentee defendant pursuant to Section 57 of the Judicial Code (R. 23-36). The stated purpose of the Pennsylvania suit was to remove a cloud on title to certain securities in the possession of Philadelphia brokers. The alleged cloud on title consisted of a third-party order, obtained on March 27, 1936, in supplementary proceedings by Capital Company, a judgment creditor of William Fox, which third-party order contained an injunction restraining the brokers from

transferring any property of William Fox, the judgment debtor. (R. 34-36)

On September 9, 1936 (the day set for hearing on the review of said referee's order directing respondent to submit its books for audit) your petitioner, as trustee, though not an inhabitant of, or found within the Eastern District of Pennsylvania, was served with a subpoena issued out of the United States District Court for the Eastern District of Pennsylvania, in the Pennsylvania suit (R. 18, 37-38). On September 18, 1936, petitioner, not having been found within said Eastern District of Pennsylvania and not having voluntarily appeared in the Pennsylvania suit, was served with a copy of an order to plead entered in said proceedings (R. 18, 37-38).

On application of your petitioner, as trustee, the bankruptcy court, being of the opinion that the trustee was improperly made a defendant in said Pennsylvania suit, and "that the prosecution of said suit against said trustee would interfere materially with the proper and orderly administration of the affairs of this bankrupt estate", enjoined and restrained respondent from further prosecuting said Pennsylvania suit against the trustee (R. 44, 45).

On appeal from the said restraining order, the Circuit Court of Appeals, over objection of petitioner, permitted respondent to incorporate into the record on this appeal the bill of complaint in a suit instituted by your petitioner, as trustee, in the Chancery Court of New Jersey subsequent to issuance by the bankruptcy

court of the said restraining order (which is the subject of the appeal here involved). The New Jersey suit was brought against respondent, the bankrupt, and members of the bankrupt's family, and sought, among other things, to recover all of the property of respondent, and all the capital stock of respondent, as property of the bankrupt estate, on the following grounds: (a) that respondent has no separate existence or identity and in fact is merely the bankrupt himself doing business under the guise of the corporate form; (b) that the original transfer of assets of a then market value of $7,000,000, together with all subsequent transfers, from the bankrupt to respondent were colorable only; (c) that the original transfer of the $7,000,000, together with all subsequent transfers, from the bankrupt to respondent were made without consideration and in fraud of creditors of the bankrupt; (d) that the purported transfer from the bankrupt to his wife of all the stock of respondent was colorable only, and (e) that the said purported transfer from the bankrupt to his wife of all of the stock of respondent was made in fraud of the creditors of the bankrupt (R. 51-123).

The Circuit Court of Appeals reversed the decree of the bankruptcy court, vacated the restraining order, and dismissed petitioner's said application therefor on the ground that the court in the Pennsylvania suit had acquired exclusive jurisdiction by virtue of Section 57 of the Judicial Code and that the bankruptcy court was without power to enjoin respondent from further prosecuting the Pennsylvania suit against the trustee.

It is this decree of the Circuit Court of Appeals which your petitioner now seeks to have reviewed.

In the course of its opinion, the Circuit Court of Appeals undertook to discuss not only the issue before it, but also to review the matter contained in the supplemental record and to express its views by *obiter dicta* upon numerous questions which have arisen or are likely to arise hereafter between respondent and your petitioner with respect to said Chancery Court suit and other proceedings. This phase of the case is discussed subsequently and more in detail (see pp. 10-12, *infra*). Suffice it to say here that of six objectionable *dicta,* five deal with matters not before the court, and the sixth concerned a collateral question unconnected with the issue on appeal.

II

QUESTION PRESENTED

The question is whether a court of bankruptcy has power to enjoin a creditor from prosecuting, as against the trustee, a suit, under Section 57 of the Judicial Code (Act of Cong., Mar. 8, 1875, c. 137, § 8, 18 Stat. 472; R. S. §§ 738, 742; 28 U. S. C. A. § 118) brought subsequent to the adjudication, in a foreign jurisdiction, where the bankruptcy court determines (1) that the trustee was improperly made a party to such suit and (2) that prosecution of said suit against the trustee would constitute an interference with the orderly administration of the bankrupt estate.

III

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of Federal law involving an interpretation of Section 57 of the Judicial Code as a limitation upon the inherent powers of a court of bankruptcy to protect its jurisdiction under the Bankruptcy Act. This question has not been, but should be, passed upon by this Court.

In the suit brought by respondent under Section 57 of the Judicial Code, the cloud on title sought to be removed is alleged to be a certain restraining order procured by another creditor. There is no claim that the trustee by his act or conduct created any cloud on title other than or in addition to whatever interest the trust estate might have in the restraining order procured by the other creditor.

It further appears that the respondent, as an alleged creditor, had theretofore appeared and filed proof of claim in the bankruptcy proceedings, the determination of which claim necessarily involved the issues which respondent now seeks to have tried in the foreign suit, and that the respondent is a corporation created by, and probably dominated and controlled by, the bankrupt, and against whom the trustee has substantial claims for the recovery of property which probably belongs to the bankrupt estate.

If, as held by the Circuit Court of Appeals, Section 57 of the Judicial Code gives respondent an absolute right with which the bankruptcy court is powerless to interfere, such interpretation will enable any fraudulent transferee, having personal property in his possession to which the trustee may assert claim, to compel such trustee to litigate the controversy in any jurisdiction to which the fraudulent transferee may choose to remove the property. Especially is this true if, as in effect held by the Circuit Court of Appeals, the mere existence of bankruptcy proceedings, or of examinations under Section 21 (a) of the Bankruptcy Act, in themselves constitute a cloud on title within the meaning of Section 57 of the Judicial Code.

The facility with which personal property such as is here involved can be moved about from place to place and secretly taken into different jurisdictions at the will of the fraudulent transferee, provides, if the decision of the Circuit Court of Appeals is not reversed, a simple device whereby the effective enforcement of the Bankruptcy Act may be seriously endangered. The fraudulent transferee, who may in fact be merely the bankrupt himself doing business in the corporate form, may take all of the property of the bankrupt into a foreign jurisdiction and there bring an action to destroy possible claims of the trustee as constituting clouds upon title. Under the decision of the Circuit Court of Appeals, the bankruptcy court is powerless to prevent such action, protect its trustee or to protect the administration of the bankrupt estate,

and this despite the fact that the fraudulent transferee has previously appeared in the bankruptcy proceedings and has filed a claim therein.

Section 57 of the Judicial Code, besides being nationwide in effect and application, is the Federal counterpart of statutes which have been enacted in almost every state in the Union. Thus the decision with respect to Section 57 affects similar suits under the statutes of the various states.

2. It is further submitted that the action of the Circuit Court of Appeals in passing upon pending and potential questions not before the court but concerning proceedings in the Chancery Court of the State of New Jersey, in the District Court of the United States for the District of New Jersey, and in the District Court of the United States for the Eastern District of Pennsylvania, has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. Such *dicta* are inevitably prejudicial and have been delivered with respect to issues not involved in the appeal and upon which your petitioner has had no opportunity to be heard.

In its opinion the Circuit Court of Appeals, although stating that the New Jersey Chancery bill had "no bearing upon the conclusion reached in this opinion", nevertheless undertook to state (a) that the only controversy between petitioner and respondent in the New Jersey Chancery suit is a separable one (thereby in

effect ruling that such suit is removable to the Federal court) (R. 146); (b) that the result of the Pennsylvania suit would be *res judicata* against respondent of all issues arising between petitioner and respondent in the New Jersey Chancery suit (thereby in effect ruling that if petitioner defends the Pennsylvania suit its result will be *res judicata* against him) (R. 146); (c) that the New Jersey Chancery suit is an improper attempt by petitioner to oust the Pennsylvania court of its jurisdiction (thereby in effect ruling that respondent may prevent such suit) (R. 146); (d) that upon proper application respondent is entitled to enjoin your petitioner from "litigating the controversy elsewhere" (thereby in effect ruling that upon application to the Pennsylvania court respondent is entitled to enjoin petitioner from prosecuting the New Jersey Chancery suit) (R. 146); and (e) that the restraint of a proper party is legally tantamount to a restraint of the court itself (thereby in effect ruling that upon the issuance of an injunction against petitioner, the New Jersey Chancery court would itself be restrained) (R. 145). In addition, the Circuit Court of Appeals stated that it was the official duty of your petitioner to appear in and defend said Pennsylvania suit, thereby in effect ruling that the bankruptcy court must order your petitioner personally to appear in said Pennsylvania suit (R. 147).

When the above issues arise from time to time in the lower courts your petitioner will point out that each of such statements is erroneous in law and will, of

course, take the position that they are mere *obiter* and nothing more. Nevertheless, in view of the high source of such *dicta*, it will be obviously difficult, if not impossible, for your petitioner to obtain the strictly impartial hearing to which he is entitled. Particularly is this true with respect to the United States District Court for the District of New Jersey* and the United States District Court for the Eastern District of Pennsylvania, both of which are under the direct appellate supervision of the court rendering the *dicta*.**

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*The *dictum* with respect to the "separable" nature of the controversies involved in the New Jersey Chancery suit is particularly objectionable. This same Circuit Court of Appeals has recently held that an order of remand based on jurisdictional grounds, of which non-separability is one, may not be reviewed by the Circuit Court of Appeals either on appeal or by mandamus. See *Bankers Securities Corp. v. Insurance Equities Corp.*, 85 F. (2) 856.

**Your petitioner's concern respecting the effect of these *dicta* is not unsubstantial. On December 1, 1936 (the day upon which the *dicta* were handed down), the United States District Court for the Eastern District of Pennsylvania enjoined your petitioner from prosecuting the New Jersey action. On December 11, 1936, stating that it was bound by the *dicta*, said Court overruled your petitioner's objection to the jurisdiction and made said injunction permanent. Furthermore, also on December 1, 1936, respondent instituted proceedings to remove the New Jersey action to the Federal Court on the ground that there was a separable controversy.

In consequence of the foregoing conduct of the Circuit Court of Appeals, your petitioner has, in substance, been deprived of his day in court and, without any opportunity to be heard, has been foreclosed both in the lower courts and upon appeal to this same Circuit Court of Appeals on each of the questions above discussed. Your petitioner earnestly submits that quite apart from whatever conclusion this Court may reach as to the merits of the controversy now on appeal, these *dicta* require the exercise by this Court of its supervisory power.

WHEREFORE your petitioner, referring to the attached brief in support of the foregoing reasons for granting the writ, respectfully prays that this Honorable Court issue a writ of *certiorari*, directing the United States Circuit Court of Appeals for the Third Circuit to certify and send to this Court a full and complete transcript of the record herein to the end that the said case may be reviewed and determined by this Court, as provided by law, and that so much of the judgment of the United States Circuit Court of Appeals for the Third Circuit as is here involved may be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

HIRAM STEELMA
Trustee in Bankruptcy of
William Fox, a Bankrupt.

BRIEF IN SUPPORT OF PETITION

I

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 142-147) has not yet been reported.

The opinion of the United States District Court for the District of New Jersey (R. 41-44) has not been officially reported.

II

JURISDICTION

The final decree of the Circuit Court of Appeals is dated December 1, 1936 (R. 148). Petition for *certiorari* is brought pursuant to Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Act of Cong., Feb. 13, 1925, c. 229 § 1; 43 Stat. 938; 28 U. S. C. A. § 347) and Section 25 of the Bankruptcy Act of 1898 (Act of Cong., July 1, 1898, c. 541, § 25; 30 Stat. 553; 11 U. S. C. A. § 48).

III

STATEMENT OF THE CASE

This has already been stated under Heading I of the petition, and said statement, in the interest of brevity is hereby adopted and made a part of this brief.

IV

SPECIFICATON OF ERRORS

1. The Circuit Court of Appeals erred in holding that the bankruptcy court had no power to enjoin respondent from further prosecution of the Pennsylvania suit against the trustee.

2. The Circuit Court of Appeals erred in reversing the decree of the United States District Court for the District of New Jersey, in vacating the injunction of said District Court and in denying to your petitioner the relief sought in his petition.

3. The Circuit Court of Appeals erred in allowing respondent to include in the record on appeal matters arising subsequent to the decree of the United States District Court for the District of New Jersey and erred in considering and passing upon such matters.

V

ARGUMENT

The statute involved is Section 57 of the Judicial Code, which provides in part as follows (Act of Cong., Mar. 8, 1875, c. 137 § 8; 18 Stat. 472 R. S. §§ 738, 742; 28 U. S. C. A. § 118):

> "When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, * * * In case such absent defendant shall not appear, plead, answer, or demur within the time so limited * * *, and upon proof of the service * * * of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to

the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; • • • "

A.

BANKRUPTCY COURT HAS INHERENT POWER TO PROTECT THE EXERCISE OF ITS JURISDICTION UNDER THE BANKRUPTCY ACT BY INJUNCTION.

As said in *Continental Illinois Nat. Bk. & Tr. Co. v. Chicago, R. I. & Pac. Ry. Co.*, 294 U. S. 648, 675:

" • • • By § 2 of the Bankruptcy Act (U. S. C. title 11, § 11), courts of bankruptcy are invested 'with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings.' They are essentially courts of equity, and their proceedings inherently proceedings in equity, the words 'at law' probably having been inserted only with regard to clause (4) of § 2, which confers authority to arraign, try, and punish bankrupts and others for violations of the act. *Local Loan Co. v. Hunt*, 292 U. S. 234, 240. Their adjudications and orders

constitute in all essential decrees in equity. *Idem,* 241. The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is, therefore, inherent in a court of bankruptcy, as it is in a duly established court of equity. Section 262 of the Judicial Code, which authorizes the United States courts 'to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions' recognizes and declares the principle * * * "

"Moreover, by § 2 (15) of the Bankruptcy Act (U. S. C. title 11, § 11), courts of bankruptcy are invested with such authority in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, including the power to 'make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.' * * * "

See also, *Local Loan Co. v. Hunt,* 292 U. S. 234, 239-241.

In so far as it held that Section 57 of the Judicial Code gave respondent an absolute right with which the bankruptcy court had no power to interfere, the decision is clearly wrong. See Section 262 of the Judicial Code (Act of Cong., Mar. 3, 1911, c. 231 § 262, 36 Stat. 1162; R. S. § 716; 28 U. S. C. A. § 377) and Section 2 (15) of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, § 2, 30 Stat. 548; 11 U. S. C. A. § 11).

B.

BANKRUPTCY COURT, IN ORDER TO PREVENT DEFEAT OR IMPAIRMENT OF ITS JURISDICTION, PROPERLY ENJOINED RESPONDENT FROM PROSECUTION OF THE PENNSYLVANIA SUIT AGAINST THE TRUSTEE.

1. The United States District Court for the Eastern District of Pennsylvania did not acquire exclusive jurisdiction over any controversy between the trustee and respondent.

Institution by respondent of the Pennsylvania suit was for the stated purpose of removing an alleged cloud on title of certain securities. Jurisdiction was not acquired in the absence of existence of an encumbrance or lien which in legal contemplation constitutes a cloud upon title. *Willing v. Chicago Auditorium,* 277 U. S. 274, 288; *Devine v. Los Angeles,* 202 U. S. 313, 334-335.

In its bill of complaint in the Pennsylvania suit, the respondent did not allege the creation by the trustee in bankruptcy of any lien or encumbrance upon the securities. The alleged cloud on title relied upon by respondent to sustain the jurisdiction of its bill comprises a lien or encumbrance created by a creditor prior to adjudication of the bankrupt.

In its bill of complaint in the Pennsylvania suit, the respondent alleged, in effect, that it had delivered certain securities to a broker in Philadelphia; that

Capital Company, on June 18, 1935, procured judgment by confession against William Fox in the United States District Court for the Southern District of New York; that on March 27, 1936, Capital Company served upon the broker a subpoena for examination of third parties (hereinafter called "third-party subpoena") in proceedings supplemental to said judgment, under authority of the Civil Practice Act of New York, which third-party subpoena had endorsed thereon a provision providing, in part, that "the third person * * * is forbidden to transfer * * * property belonging to the judgment debtor * * * until further order of the court"; that said injunction is still in full force and effect; that in proceedings upon motion to vacate the third-party subpoena, Capital Company filed affidavits averring that it had reason to believe that the securities were in fact the property of William Fox; and that Capital Company has consistently claimed that the securities were in fact the property of William Fox and not that of respondent.

Obviously, the foregoing allegations are wholly insufficient to sustain jurisdiction of any claim as against the trustee. Appreciating this, the respondent has endeavored to lend colorable basis for jurisdiction as against the trustee by alleging, in effect, that subsequent to the adjudication of the bankrupt, the petitioner, as trustee, appeared before the bankruptcy court and joined in an application to have the third-party subpoena proceedings and the injunction contained in said third-party subpoena continued, not-

withstanding pendency of the bankruptcy proceedings, as a result of which the bankruptcy court "permitted the said third-party subpoena proceedings and the injunction contained therein to continue; and since the date of his appointment as such trustee [he] has ratified and approved in all respects the procedure followed by the Capital Company, as aforesaid, with reference to the said third-party subpoena and the injunction contained therein."

But the foregoing allegations are wholly insufficient to confer jurisdiction as against the trustee, as distinct from the creditor. On the facts alleged the trustee has created no cloud upon title but has merely not opposed, for the time being, continuation by a creditor of a third-party subpoena served prior to adjudication of the bankrupt.

2. The bankruptcy court first acquired exclusive jurisdiction over the only issue involved in the Pennsylvania suit between Capital Company and the trustee.

Immediately upon the adjudication of William Fox a bankrupt, on May 29, 1936, the bankruptcy court became vested with exclusive jurisdiction over any controversy between Capital Company and the trustee with respect to the validity of the former's lien or whether enforcement thereof shall be for the sole benefit of Capital Company or for the benefit of the bankrupt estate. Such exclusive jurisdiction having thus attached, the Pennsylvania court was without power

thereafter to acquire jurisdiction over this controversy without consent of the bankruptcy court.

That the above is the only possible issue in the Pennsylvania suit as between Capital Company and the trustee, is evident. If respondent is successful in its attempt in the Pennsylvania suit to remove the restraint contained in the third-party subpoena as a cloud upon title to the securities, there can be no controversy between Capital Company and the trustee. If, however, respondent is unsuccessful and Capital Company sustains its third-party subpoena by showing that the said securities are in fact the property of the bankrupt, the trustee for the first time will then become involved in a controversy with Capital Company over enforcement of alleged lien against property of the bankrupt. Over this controversy the bankruptcy court has exclusive jurisdiction. *Isaacs v. Hobbs Tie & T. Co.*, 282 U. S. 734, 738-739; *Straton v. New*, 283 U. S. 318, 321. Under such circumstances there can be no doubt but that the bankruptcy court could enjoin determination in the Pennsylvania suit of that controversy. *A fortiori* it may now enjoin in advance assumption of unwarranted jurisdiction to determine such potential controversy.

3. Bankruptcy court first acquired jurisdiction of issue as to identity of bankrupt and respondent.

Upon appearing and filing proof of claim in the bankruptcy proceedings, respondent thereby submitted

to the jurisdiction of the bankruptcy court the determination of all questions concerning the validity of said claim. In view of the facts brought out before the bankruptcy court as to relationships between the bankrupt and the respondent, it is obvious that one of the principal issues presented by respondent's proof of claim is whether respondent is a mere instrumentality of the bankrupt. Cf. *Edward Finch Co. v. Robie,* 12 F. (2d) 360; 4 Remington on Bankruptcy (4th Ed., 1935), Section 1538. Although it does not appear in the record that such objection has been made to respondent's claim, nevertheless this fact may be inferred in view of the allegations contained in petitioner's bill of complaint in the Chancery Court of New Jersey (R. 52-123), which was incorporated into the record on appeal on motion of respondent over petitioner's objection (R. 51, 52).

Thus, long prior to the institution of the Pennsylvania suit, the bankruptcy court acquired *in personam* jurisdiction of respondent to determine the question as to whether or not respondent and the bankrupt are one and the same. This controversy the Circuit Court of Appeals has held to be inherent as petitioner's defense in the Pennsylvania suit (R. 146).

The fact that plenary suit might ultimately be required to compel respondent as an adverse claimant to surrender property to the trustee does not detract from the inherent power of the bankruptcy court to pass upon all questions arising in connection with the validity of respondent's claim. See *Bronx Brass*

Foundry, Inc. v. Irving Trust Co., Trustee, 297 U. S. 230, 231; compare *Alexander v. Hillman,* 296 U. S. 222 (holding that filing proof of claim in receivership proceedings is submission to jurisdiction of court for purpose of counterclaim against creditor to recover property belonging to estate).

Such issues being already before the bankruptcy court, it was within the discretion of that court to determine whether such issues should be litigated either in the bankruptcy court, or in a plenary suit directed to be brought by the trustee, or whether it would be in the interests of the bankrupt estate for the trustee to appear and litigate these issues in the Pennsylvania suit brought by respondent.

The Pennsylvania suit at most involved only issues as to ownership of a part of the property now in the possession of respondent, and, of course, could not involve the ownership of respondent's capital stock. Therefore, regardless of the outcome of the Pennsylvania litigation, it would in any event be necessary for the trustee to institute plenary suit in order to determine ownership of all the stock of respondent, as well as to determine the ownership of all the remainder of respondent's property not specifically in issue in the Pennsylvania suit.

The bankruptcy court, in the exercise of its discretion, therefore, properly enjoined needless litigation in the Pennsylvania suit and thereafter in the exercise of its discretion quite properly authorized the trustee to institute the plenary suit in the New Jersey

Chancery Court (R. 123). This New Jersey suit is obviously more appropriate under the circumstances in that it will determine all controversies and avoid a multiplicity of suits.

4. Bankruptcy court properly enjoined respondent on ground that respondent was dominated and controlled by the bankrupt.

While the bankruptcy court may not exercise summary jurisdiction to obtain property adversely held by respondent, unless claim of title be merely colorable, it is submitted that upon adequate showing that respondent is controlled and dominated by the bankrupt, the bankruptcy court has inherent jurisdiction to restrain the bankrupt from instituting, through the agency of respondent, vexatious litigation for the purpose of interfering with orderly administration of the bankrupt estate.

C.

REGARDLESS OF THE MERITS OF THE PRECISE ISSUE ON APPEAL, THIS COURT SHOULD EXERCISE SUPERVISORY POWER IN ORDER TO RELIEVE THIS PETITIONER FROM THE PREJUDICIAL EFFECTS OF THE DICTA CONTAINED IN THE OPINION OF THE CIRCUIT COURT OF APPEALS.

Respectfully submitted,

Wm. Elmer Brown, Jr.
Counsel for Petitioner.